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# In the Supreme Court of the United States

OCTOBER TERM, 1983

MICHIGAN CANNERS AND FREEZERS ASSOCIATION, INC., ET AL., APPELLANTS

*v.*

AGRICULTURAL MARKETING AND BARGAINING BOARD, ET AL.

*ON APPEAL FROM THE SUPREME COURT OF MICHIGAN*

**BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING APPELLANTS**

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## QUESTION PRESENTED

Whether certain provisions of Michigan's Agricultural Marketing and Bargaining Act are preempted by the federal Agricultural Fair Practices Act of 1967.

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## BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING APPELLANTS

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This brief is submitted in response to the Court's invitation to the Solicitor General to express the views of the United States.

### STATEMENT

This case is a challenge to certain provisions of Michigan's Agricultural Marketing and Bargaining Act (Mich. Comp. Laws § 290.701 *et seq.* (Mich. Stat. Ann. § 12.94(101) *et seq.* (Callaghan rev. 1981)), which are alleged to conflict with the federal Agricultural Fair Practices Act of 1967 (7 U.S.C. 2301 *et seq.*). The Michigan Supreme Court found that the state law was not preempted by the federal Act.

1. The federal Agricultural Fair Practices Act of 1967, 7 U.S.C. 2301 *et seq.* ("AFPA"), guarantees farmers and

other producers of agricultural commodities ("producers")[1] the freedom to join cooperative associations without fear of reprisal from those who acquire agricultural products ("handlers").[2] 7 U.S.C. 2303 makes it unlawful for any handler to engage in practices that interfere with a producer's freedom to associate. Section 2303(a) prohibits any handler to "coerce any producer in the exercise of his right to join and belong to or to refrain from joining or belonging to an association of producers * * *." Section 2303(b) forbids handlers to discriminate against producers concerning price, quantity, quality, or terms of purchase, because of membership in an association. Section 2303(c) forbids handlers to coerce producers into, or out of, a membership agreement or contract with an association. Section 2303(d) prohibits handlers to offer money or other inducements to keep producers from joining an association. Handlers are also forbidden to make false reports about the finances, management, or activities of associations (7 U.S.C. 2303(e)).

Although the Act forbids handlers to interfere with a producer's choice to join (or not to join) an association, it does not prevent handlers and producers from dealing or

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[1] 7 U.S.C. 2302(b) provides:

> The term "producer" means a person engaged in the production of agricultural products as a farmer, planter, rancher, dairyman, fruit, vegetable, or nut grower.

[2] 7 U.S.C. 2302(a) provides:

> The term "handler" means any person engaged in the business or practice of (1) acquiring agricultural products from producers or associations of producers for processing or sale; or (2) grading, packaging, handling, storing, or processing agricultural products received from producers or associations of producers; or (3) contracting or negotiating contracts or other arrangements, written or oral, with or on behalf of producers or associations of producers with respect to the production or marketing of any agricultural product; or (4) acting as an agent or broker for a handler in the performance of any function or act specified in clause (1), (2), or (3) of this paragraph.

refusing to deal with one another for other reasons. 7 U.S.C. 2304 states that "[n]othing in this chapter shall prevent handlers and producers from selecting their customers and suppliers for any reason other than a producer's membership in or contract with an association of producers, nor require a handler to deal with an association of producers." The Act does not attempt to occupy the entire field of regulation. Its provisions "shall not be construed to change or modify existing State law nor to deprive the proper State courts of jurisdiction" (7 U.S.C. 2305(d)).

2. The Michigan Agricultural Marketing and Bargaining Act, Mich. Comp. Laws § 290.701 *et seq.*, enacted in 1972, makes illegal the same handler conduct forbidden by the AFPA. Mich. Comp. Laws § 290.704(1). But the Michigan Act goes beyond the federal Act by regulating producers as well as handlers. It creates an agricultural marketing and bargaining board, within the Michigan department of agriculture, that accredits producer associations and mediates disputes. *Id.* §§ 290.703, 290.707, 290.715. It forbids associations to discriminate against producers; to refuse to bargain with handlers with whom the association or its members have had substantial prior dealing; to coerce or intimidate handlers in certain respects; and to make unsubstantiated reports about the finances, management, or activities of other associations or handlers. *Id.* § 290.704(2).

To be accredited, an association must have marketing and bargaining contracts (for the relevant period) with more than 50% of the producers in the bargaining unit. These contracts must also include more than 50% of the commodity produced in the bargaining unit. Mich. Comp. Laws § 290.707(c). Once accredited, the association acts as the exclusive bargaining agent for all producers in the bargaining unit, and producers must pay a service fee to the association. A producer must pay the fee, and abide by the terms of the contracts negotiated with handlers, even if he is not a member of the association. *Id.* §§ 290.710(1), 290.713(1).

3. The Michigan Agricultural Cooperative Marketing Association, Inc. ("MACMA") is an association accredited under the Michigan Act. It is the sole sales and bargaining representative for certain Michigan producers of asparagus. In 1974, MACMA negotiated contracts with handlers. Shortly thereafter appellants (representatives of handlers and producers) sued in the Ingham County Circuit Court for a declaration that the portions of the Michigan Act requiring service fees, and mandatory producer adherence to the association contracts, were preempted by the federal Act. The Circuit Court ruled that the case could be brought only in the Michigan Court of Appeals, and dismissed (J.S. App. A33-A37). The Michigan Court of Appeals also dismissed for want of jurisdiction (*id.* at A38-A39), and an appeal was taken to the Michigan Supreme Court. The Michigan Supreme Court remanded the matter to the Circuit Court, which it found was empowered to hear the case (*id.* at A44-A59). After a non-jury trial the Circuit Court ruled that the state statute was not preempted (*id.* at A60-A76).

4. The Michigan Supreme Court affirmed (J.S. App. A1-A32). Appellants argued that the federal Act gave handlers a right to deal with producers of their choice, and producers a right to deal with handlers of their choice. They urged that the Michigan Act, by requiring all producers in a bargaining unit to pay a service fee and adhere to the terms of the contract negotiated by the association, violated these rights.

The Michigan Supreme Court rejected that claim. It found the federal Act limited to preventing certain kinds of *handler* misconduct. The court thus viewed Michigan's regulation of *producers* as a step into an area that the federal government had not attempted to regulate (J.S. App. A14):

> In our view, the provisions of AMABA affording exclusive representation to a producers' cooperative

created by the majority of producers of a particular commodity, and the requirement of service fees, was a step by the Michigan Legislature into a previously unregulated area; a step which furthers both the goals of FAFPA and others not prevented by FAFPA by taking an active role in enhancing the bargaining position of producers, protecting not only individuals, but also their associations from internal and external pressures.

The court also rejected appellants' argument that compliance with the two statutes was physically impossible (J.S. App. A16-A17).

## ARGUMENT

1. This Court has held that federal regulation should not be deemed to preempt state regulatory power except for persuasive reasons. If there is no explicit preemptive language, the federal action must touch a field where federal regulation is dominant, or there must be an actual conflict with federal law. *Fidelity Federal Savings & Loan Ass'n* v. *de la Cuesta*, No. 81-750 (June 28, 1982), slip op. 9-10. Here there is no explicit preemptive language. The federal Act states that it "shall not be construed to change or modify existing State law" (7 U.S.C. 2305(d)). Nor, as appellants admit, is the federal interest so dominant that the field of regulation has been entirely occupied (J.S. 8). This Court has recognized that "the supervision of the readying of foodstuffs for market has always been deemed a matter of peculiarly local concern." *Florida Lime & Avocado Growers, Inc.* v. *Paul*, 373 U.S. 132, 144 (1963).

The question, therefore, is whether the state and federal Acts are in conflict—that is, whether compliance with both is "a physical impossibility" (373 U.S. at 142-143), or whether state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of

Congress." *Hines* v. *Davidowitz*, 312 U.S. 52, 67 (1941); *Fidelity Federal Savings & Loan Ass'n* v. *de la Cuesta*, *supra*, slip op. 12-16. This in turn depends upon "Congress' intent in enacting the federal statute at issue." *Shaw* v. *Delta Air Lines, Inc.*, No. 81-1578 (June 24, 1983), slip op. 9.

2.a. We believe that insofar as the Michigan Act requires all producers in a bargaining unit to pay a service fee and adhere to the terms of the contract negotiated by the association, it frustrates the "purposes and objectives" of the AFPA. That conclusion is not compelled by the principal thrust of the federal Act, which in general is designed to prevent handlers from interfering with the formation of cooperative associations by exerting pressure on individual farmers. Nor does the federal Act attempt to address in a comprehensive way — as the Michigan Act does — the collective bargaining rights of producers and handlers. See 114 Cong. Rec. 7453-7454 (1968) (remarks of Rep. Poage); *id.* at 7456 (remarks of Rep. May).[3] Nevertheless, both the explicit terms of the federal Act and its legislative history indicate that Congress intended to protect individual producers against any sort of compulsion to join (or to be effectively controlled by) cooperative associations. The Michigan Act stands as an obstacle to that purpose.

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[3]Moreover, this Court has recognized that the states retain authority to regulate directly the marketing of agricultural products — including such matters as the price at which commodities are sold. *Parker* v. *Brown*, 317 U.S. 341 (1943). And it might be argued that direct state control of agricultural marketing interferes no less with the freedom of individual producers than the exercise of similar power by cooperative associations. But as this Court has noted in other contexts, there may be differences between direct state control of such matters as prices, and delegation of the same control to private parties. Compare *Parker* v. *Brown*, *supra*, with *California Retail Liquor Dealers Assn.* v. *Midcal Aluminum, Inc.*, 445 U.S. 97 (1980). Cf. *Larkin* v. *Grendel's Den, Inc.*, No. 81-878 (Dec. 13, 1982), slip op. 6.

7 U.S.C. 2303 provides that (emphasis added):

> It shall be unlawful for any handler knowingly to * * * engage in the following practices:
>
> (a) *To coerce any producer in the exercise of his right* to join and belong to or *to refrain from joining* or belonging to *an association* of producers * * *.

The term "handler" is defined in 7 U.S.C. 2302 (emphasis added):

> (a) The term "handler" means *any person* engaged in the business or practice of * * * (3) contracting or *negotiating contracts or other arrangements* * * * *on behalf of producers* * * * *with respect to* the production or *marketing* of any agricultural product * * *.

And "[t]he term 'person' includes * * * associations." 7 U.S.C. 2302(d). In short, the federal Act forbids an association of producers — which "negotiat[es] * * * on behalf of producers" — "[t]o coerce any producer in the exercise of his right to * * * refrain from joining * * * an association of producers * * *." See *Butz* v. *Lawson Milk Co.*, 386 F.Supp. 227, 235 (N.D. Ohio 1974) (an association of producers is a "handler" within the meaning of the AFPA); *Marketing Assistance Plan, Inc.* v. *Associated Milk Producers, Inc.*, 338 F.Supp. 1019, 1024 (S.D. Tex. 1972) (same).

This conclusion was clearer in the original language of the Senate bill, S. 109, 90th Cong., 1st Sess. (1967). It stated (113 Cong. Rec. 21410 (1967) (emphasis added)):

> SEC. 4. *It shall be unlawful for any* handler or *association of producers* knowingly to engage * * * in the following practices:
>
> (a) *To coerce any producer in the exercise of his right* to join and belong to or *to refrain from joining* or belonging to *an association* of producers * * *.

The Senate Report concerning that section stated:

> The objective of the bill is to protect the producer in the exercise of a free choice. Many witnesses suggested that the bill did not fully accomplish this purpose, because it protected the producer only from improper pressure not to join an association. To protect his free choice he should also be protected from improper pressure in the other direction, that is, improper pressure to join an association. The committee * * * was convinced by the logic of the situation that if the objective is to protect the producer and afford him a free choice, the bill should protect him from pressure in either direction.

S. Rep. No. 474, 90th Cong., 1st Sess. 5 (1967). The Report went on to note (*id.* at 6) that although "section 4(a) prohibits coercion on the part of both the handler and the association of producers[,]" subsection 4(d), which deals with inducements or rewards (cf. 7 U.S.C. 2303(d)), should only apply to the former. "[T]he association of producers should not be prohibited from offering inducements to producers to belong to an association, since it is quite proper for the association to pursue vigorously the *voluntary* organization of farmers in its attempt to secure a better bargaining position for farmers." S. Rep. No. 474, *supra*, at 6 (emphasis added).[4] The Report also observed, in regard to Section 4(c) (7 U.S.C. 2303(c)), that the individual producer "should be free from improper pressure to interfere with his arrangements and dealings with handlers; and the committee substitute would provide him with this protection" (S. Rep. No. 474, *supra*, at 6).

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[4] 7 U.S.C. 2303(d), like the original Senate version, still only applies to prohibit handlers from offering "any * * * inducement or reward to a producer for *refusing to or ceasing to belong* to an association of producers" (emphasis added).

S. 109 was passed by the Senate in the form reported out by the Committee on Agriculture and Forestry (113 Cong. Rec. 21411 (1967)). Senator Aiken, the bill's sponsor, briefly summarized it by saying (*ibid.*): "This bill * * * is designed to protect the agricultural producer's right to decide, free from improper pressures, whether or not he wishes to belong to a marketing or bargaining association."

The bill was referred to the House Committee on Agriculture (113 Cong. Rec. 21582 (1967)), which rejected a proposal "to delete the application of any prohibited practices * * * to associations of producers * * *." H.R. Rep. No. 824, 90th Cong., 1st Sess. 4 (1967). At the suggestion of the Committee on Rules, however, the House deleted the phrase "or association of producers" from Section 4 of the bill. See 114 Cong. Rec. 7449 (1968). Representative Sisk, on behalf of the Rules Committee, explained the change (*id.* at 7464):

> Since the bill already makes clear that associations of producers are not excluded from the term "handler," this phrase is redundant and could be misconstrued as unfairly pointing the finger of accusation to associations of producers. This is not the intent; and while my amendments do not change the purpose or basic meaning of the bill, they make misinterpretation more difficult.

Representative Poage, chairman of the House Committee on Agriculture, expressed a similar understanding of what the bill would do (*id.* at 7451, 7452):

> [W]e wanted to make this bill apply in both directions — to make of it a two-way street — to make of it a protector of the right of the producer to determine for himself whether he cared to or did not care to become a member of a cooperative.

> We * * * would actually assure to any producer the right to belong or not to belong to a cooperative.
>
> * * * * *
>
> The only thing which the co-ops cannot do is to go out and coerce a nonmember into becoming a member of the co-op and thereby come under the legislation. That is the only thing which this bill does not permit.

See also *id.* at 7450 (remarks of Rep. Latta) ("the farmers of this Nation will still have the right * * * to say to an association, 'I do not want to join your association and you cannot force me into it'"). Among the reasons for preserving the producer's right not to join an association, according to Representative Latta, was that "[t]he fees being charged by these associations are no small matter to the farmer. * * * Some of these associations are assessing members 1 percent of [their] gross. That is $250 out of that farmer's pocket to belong to the association" (*ibid.*).

b. The Michigan Supreme Court believed that "[w]hile § 2303 makes it unlawful for a handler to coerce a producer to 'join or belong to' an association, it does not forbid a *state* from requiring exclusive representation of individual producers where a producer majority sees fit" (J.S. App. A10; emphasis in original). But all that the Michigan Act does is to empower an association of producers—once it has attained the requisite size—to do what the federal Act forbids. A state may no more do this than it may empower other "handlers" to violate the terms of the federal Act.

Nor do we think it meaningful that the Michigan Act, while requiring exclusive representation and payment of dues, does not insist that producers actually become members of an accredited association. See J.S. App. A10 n.13. Whether or not a producer in the bargaining unit joins the association, he is bound, when dealing separately and individually with a handler, by the terms and conditions of

the contract negotiated by the association with handlers (*id.* A6). As the Senate Report noted, however, the federal Act intended to leave an individual producer "free from improper pressure to interfere with his arrangements and dealings with handlers" (S. Rep. No. 474, *supra*, at 6). And as Representative Latta stated in the course of the House debate, one of the reasons for protecting producers' freedom to refrain from joining an association was to avoid imposing on the unwilling the obligation of paying fees that could amount to "1 percent of [a producer's] gross" (114 Cong. Rec. 7450 (1968)). With respect to the aims of the federal Act, the requirements imposed by the State of Michigan are the "practical equivalent" of a requirement of formal membership. Cf. *NLRB* v. *General Motors Corp.*, 373 U.S. 734, 743 (1963); *Abood* v. *Detroit Board of Education*, 431 U.S. 209, 217 n.10 (1977).

3. Appellants also argue that Congress in the federal Act intended "to protect a processor's right to deal individually with farmers" (J.S. 18), and that the Michigan Act conflicts with that right as well. It is true that Mich. Comp. Laws § 290.713(1) makes "[a]n accredited association * * * the exclusive representative of all producers in the bargaining unit for the purpose of bargaining with all handlers that purchase the agricultural commodity produced in the bargaining unit." And, as noted above, even producers who have not joined the association are bound "by all terms and conditions of the contract negotiated with handlers" (J.S. App. A6). Appellants contend that that requirement runs afoul of 7 U.S.C. 2304, which states:

> *Disclaimer of intention to prohibit normal dealing*
>
> Nothing in this chapter shall prevent handlers and producers from selecting their customers and suppliers for any reason other than a producer's membership in

or contract with an association of producers, nor require a handler to deal with an association of producers.

The Michigan Supreme Court, by contrast, found that Section 2304 was nothing more than its caption suggests: a "[d]isclaimer of intention to prohibit normal dealing" (J.S. App. A7). "There is no logical nexus," the court said, "between a provision declaring 'this is what we did not do' and the conclusion that 'what we did not do, cannot therefore be done' " (*id.* at A8). It found this interpretation to be supported both by the prohibited practices section of the Act (7 U.S.C. 2303) and by the legislative history (J.S. App. A9-A14).

We doubt that the AFPA was intended, as appellants have argued (J.S. App. A7), to strike "a careful balance" among "the conflicting interests of individual producers, processors, and associations[,]" and to create or protect "a *processor's* right to deal with the individual farmer of his choice." If handlers can insist on dealing directly even with producers who have voluntarily appointed an association as their designated agent, the protections of the AFPA would not be meaningful. We note that Section 2304, while generally disclaiming any intent to interfere with a handler's choice of suppliers, makes clear that a handler may *not* reject a producer simply because he has joined an association.[5] Moreover, the only portion of the federal Act clearly

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[5]The section goes on to say that nothing in the Act "require[s] a handler to deal with an association of producers." Contrast Mich. Comp. Laws § 290.704(1)(g). That is, of course, true. Section 2303 addresses only handlers' dealings with "producers," a term that does not include associations. See 7 U.S.C. 2302(b). The obligation, such as it is, to deal with an association appointed by a producer as his agent arises from the voluntary act of the producer, coupled with the prohibition of discrimination against a producer "because of his membership in or contract with an association" (7 U.S.C. 2303(b)).

creating duties — and corresponding rights — is 7 U.S.C. 2303, which does nothing more than prohibit certain handler practices. See also 114 Cong. Rec. 7464 (1968) (remarks of Rep. Sisk) ("Certainly we want to avoid the interpretation that the legislation intends to encourage the circumvention of properly constituted marketing or bargaining associations.").[6]

In any event, this issue does not seem to present an independent ground for reversal of the Michigan Supreme Court's judgment. If nonmember producers may (consistent with the AFPA) be bound by the terms of contracts negotiated by an association, it is highly unlikely that the federal Act intended to grant handlers the right to insist that such terms be ignored. If, on the other hand, the AFPA permits any willing producer to remain aloof from an association and negotiate individually, the handlers' right invoked by appellants does not, as a practical matter, enlarge the class of suppliers with whom handlers may deal.

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[6]It may be that a different question is presented in cases where a handler has a preexisting contract with a producer, and the contract contemplates direct dealings between the handler and the producer. See *Butz* v. *Lawson Milk Co., supra,* 386 F.Supp. at 238-240. The AFPA need not be understood to require a handler in such a case to deal under the contract with an association that the producer has unilaterally appointed as his agent.

## CONCLUSION

Probable jurisdiction should be noted.

Respectfully submitted.

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